

COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

JOHN W. NOBLE  
VICE CHANCELLOR

417 S. STATE STREET  
DOVER, DELAWARE 19901  
TELEPHONE: (302) 739-4397  
FACSIMILE: (302) 739-6179

December 17, 2003

Douglas B. Catts, Esquire  
Schmittinger and Rodriguez, P.A.  
414 South State Street  
P.O. Box 497  
Dover, DE 19903-0497

Ilona M. Kirshon, Esquire  
Department of Justice  
Carvel State Office Bldg., 6th Floor  
820 North French Street  
Wilmington, DE 19801

Re: Delaware Correctional Officers Association, et al. v.  
State of Delaware, Department of Correction, et al.  
C.A. No. 1491-K  
Submitted: March 3, 2003

Dear Counsel:

Two correctional officers and their bargaining representative bring this appeal from a decision of the Public Employment Relations Board (the "Board") to challenge the adequacy of the remedy imposed upon Appellee State of Delaware, Department of Correction (the "State" or the "Department"), as the result of anti-union animus evidenced by one, if not two, members of a promotion committee and its alleged effect on the promotional process in which the correctional officers were participating. In addition to contesting the Board's remedy, the Appellants

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 2

also question the Board's factual findings and certain procedures followed by the Board.

### **BACKGROUND**

Appellants, Thomas J. Lighthall ("Lighthall") and James A. Fritsch ("Fritsch"), correctional officers employed by the Department, and the Delaware Correctional Officers Association (the "DCOA"), their bargaining representative (collectively, the "Charging Parties"), filed unfair labor practice charges under the Public Employment Relations Act (the "Act"),<sup>1</sup> alleging that Appellees Patrick Cirwithian ("Cirwithian") and Avery Harmon ("Harmon"), supervisory employees in Food Services at the Department, committed unfair labor practices by making anti-union statements and taking anti-union actions in the course of the selection process in which Lighthall and Fritsch, active members of the DCOA, were considered for promotion.

Fritsch and Lighthall, who work in Food Services for the Department, applied for promotion to the position of C/O Cook Manager and were selected for

---

<sup>1</sup> 19 Del. C. Ch 13.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 3

interviews. The promotional process was guided by a promotion committee consisting of four supervisory employees of the Department. Harmon and Cirwithian were two of its members.<sup>2</sup> Thirteen candidates, including Fritsch and Lighthall, were selected for the first round of interviews for the two open positions. Following that first round, Fritsch was rated ninth and was eliminated from further consideration, but Lighthall was rated second, in a tie with two other candidates. During the first round, Harmon ranked Fritsch and Lighthall higher than the average of the committee. Following the second round of interviews, Harmon again ranked Lighthall favorably, but Lighthall did not receive the promotion.

The Charging Parties filed their unfair labor practice charges because of their perception that the promotional process was tainted and the employees' rights to participate in the DCOA and its representative activities were infringed as a result of the anti-union bias of Harmon and Cirwithian. Briefly, Harmon has made numerous comments to bargaining unit members that demonstrated his anti-union bias. For example, after his unsuccessful application, Fritsch was told by Harmon

---

<sup>2</sup> The Charging Parties do not contend that the other two members of the Committee harbored any anti-union sentiment.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 4

that "with [Harmon's] experience . . . over the years that anybody that was involved with the union sometimes had problems with Management." Indeed, in that conversation, Harmon told Fritsch that he "would not be [a] union person" and explained his reasons for that position. Harmon's bias was even more evident during his conversation with Lighthall after Lighthall's failed effort to obtain promotion: "I [Harmon] mentioned to you [Lighthall] before that any time that you are involved in the union affiliation or the grievances, you know that you don't stand much of a chance of getting promoted in Food Service." Harmon also discussed the unsuccessful Fritsch and Lighthall promotion applications with another correctional officer, Neil Schepens, who quoted Harmon as having said, "I [Harmon] pulled him [Fritsch] aside and told him, as long as you stay involved with the union, you will not be promoted in the Department."

Cirwithian's freedom from bias is attacked by the Charging Parties because, according to the Charging Parties, he asked several questions during the promotional interviews regarding the applicants' union and disciplinary experience, worked closely with Harmon, and did nothing to discourage the anti-union conduct of Harmon.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 5

The Board's executive director, as hearing officer, conducted a two-day hearing on the unfair labor practice charges.<sup>3</sup> He found that Cirwithian made no statements in violation of the Act, that Harmon, in contrast, had violated the Charging Parties' rights secured by the Act, and that the promotional selection procedures did not violate the Act. Finally, he determined that the appropriate sanction was to direct that the State cease and desist from interfering with employees' rights under the Act, that appropriate notice be posted, and that the State refrain from taking any retaliatory actions against DCOA's members. His findings were premised, in part, upon his determination that Cirwithian's questions regarding union contract and discipline issues were appropriate and relevant to the duties of the vacant position which included the management and supervision of employees who are members of DCOA.

The hearing officer also concluded that the integrity of the promotional process was not compromised. He reached this conclusion by employing the

---

<sup>3</sup> A hearing on unfair labor practice charges may be before the Board "or any designated agent thereof." 19 *Del. C.* § 1308(a).

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 6

analytical approach of *Wright Line*.<sup>4</sup> In order to demonstrate that actionable conduct occurred, the employee must show: (1) that the employee engaged in protected actions; (2) that the employer was aware of such actions; and (3) the protected actions were a substantial or material factor for the employer's actions.<sup>5</sup> The hearing officer found that Lighthall and Fritsch, as active members of DCOA, had engaged in protected activities and that the employer (or at least Harmon) was aware of those activities. The hearing officer, however, determined that the Charging Parties had not demonstrated that Harmon's anti-union animus was a substantial or material factor in the decision not to promote Lighthall or Fritsch. This decision was based primarily upon the relatively favorable assessment (as compared to the evaluations by the other members of the promotion panel) of Lighthall and Fritsch made by Harmon.

---

<sup>4</sup> 251 N.L.R.B. 1083 (1980), *enforced sub nom. NLRB v. Wright Line*, 662 F.2d 889 (1st Cir. 1981). This approach has been followed by Board. *See, e.g., Wilmington Firefighters Ass'n, Local 1590 v. City of Wilmington*, Del. PERB, ULP No. 93-10-093 (1994).

<sup>5</sup> If a charging party can satisfy this test, the burden would then shift to the employer to establish that a legitimate business rationale, despite the protected activity, would have caused the same business decision.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 7

The Charging Parties sought review by the Board.<sup>6</sup> That effort focused on the adequacy of the remedy prescribed by the hearing officer; his finding that the promotional process was not tainted by anti-union animus; and the determination that Cirwithian was not guilty of unfair labor practices.

The Board held four hearings in this matter before the appeal to this Court. At the first hearing, two of the three Board members were present and they voted to affirm the hearing officer's findings as to unfair labor practices but to remand for further proceedings to allow him to reconsider the recommended remedy. At the second hearing, with all three Board members present, the Board vacated its earlier decision, based in part upon recognition that the decision had been reached on less than the full record before the hearing officer.<sup>7</sup> At the next hearing, the Board heard extensive argument and then solicited additional written argument.

At the fourth hearing, the Board deliberated and announced its decision.<sup>8</sup> The Board agreed (and the State did not challenge) that Harmon had engaged in

---

<sup>6</sup> Charging Parties' Mot. for Review of Executive Director's Decision and Req. to Argue Orally, App. II to Appellants' Opening Br., at A-429 [hereinafter App. II]. The State did not cross-appeal.

<sup>7</sup> App. II at A-427.

<sup>8</sup> App. II at A-418.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 8

actionable anti-union conduct through his several comments, but it concluded that Cirwithian had not acted in any way that infringed the Charging Parties' organizational or representative rights. Although one member concluded that Harmon's activity tainted the promotional process and, as a consequence, the promotional process should be redone, the other two members, including the member absent from the first hearing, agreed with the hearing officer's recommendation in its entirety. The majority, in rejecting the minority view that the promotional process should be redone, stated that the cease and desist order was "enough" and was an "appropriate" remedy. Thus, by a two-to-one vote, the Board adopted the hearing officer's decision in its entirety.<sup>9</sup>

The Board, thereafter, set forth its decision in writing.<sup>10</sup> It adopted the hearing officer's determination that the evidence was insufficient to support a finding that Cirwithian made actionable statements or engaged in other conduct

---

<sup>9</sup> App. II at A-424.

<sup>10</sup> App. I to Appellants' Opening Br., at A-4 [hereinafter App. I].



Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 9

prohibited by the Act.<sup>11</sup> The Board recognized that the hearing officer, as the person receiving the testimony, was in the better position to assess the credibility of the witnesses. The Board accepted the unchallenged finding of the hearing officer that Harmon's anti-union statements constituted an unfair labor practice by the State, as employer.<sup>12</sup> It then turned to the appropriate remedy:

The Board majority concluded after a complete review of the entire record, that DCOA had failed to establish Mr. Harmon discriminated against employees based upon union activity. Insofar as the promotion procedure, Mr. Harmon rated Mr. Lighthall and Mr. Fritsch higher than others on the selection team during the first round of interviews, including those against whom no allegations of anti-union bias were made. During the second round of interviews he rated Mr. Lighthall higher than did anyone else on the selection team. It is reasonable to conclude that had he been truly biased against Mr. Fritsch and Mr. Lighthall, he would have given them lower scores.

The State has established that the decisions of the selection team were appropriate and valid. Our review of the applications of [the applicants selected], when compared with Mr. Fritsch and Mr. Lighthall, reveals there were in fact, legitimate and nondiscriminatory

---

<sup>11</sup> The Charging Parties had alleged that Cirwithian's actions were violative of 19 *Del. C.* §§ 1303(3) (public employees' right to engage in concerted activities for purpose of collective bargaining) and 1307(a)(1) (interfering with employee in the exercise of rights protected by Act), (c)(3) (discouraging union membership by discriminating in regard to hiring and terms and conditions of employment), & (c)(6) (refusing to comply with requirements of Act).

<sup>12</sup> Harmon's statements were deemed violations of 19 *Del. C.* §§ 1303(3) & 1307(c)(1), (c)(3), & (c)(6). Charges that Harmon had violated 19 *Del. C.* § 1307(c)(4) (discriminating against employee for having filed complaint or given testimony under the Act) were rejected.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 10

reasons for the selection decisions. Accordingly, we do not accept DCOA's argument that a penalty more severe than the Cease and Desist order proscribed [sic] by the [hearing officer] is appropriate. After reviewing all of the evidence and arguments, including the cases submitted by the parties, we conclude that while violations occurred, they are not of such severity as to warrant a remedial order other than the Cease and Desist order imposed by the [hearing officer].

In reviewing whether the Cease and Desist order is an appropriate remedy, we sought guidance in a text widely utilized by labor lawyers and labor law practitioners, namely The Developing Labor Law: the Board, the Courts, and the National Labor Relations Act, 3rd ed., Bureau of National Affairs (1992). ([The State's counsel] also quoted from this text in the State's Post-Hearing Brief.) Quoting from that text, the authors state that "... where the employer has committed violations of Section 8(a)(1) – interference with, restraint of, or coercion of employees in the exercise of Section 7 rights – the Board will normally issue a cease and desist order . . . . In general, the order will proscribe the conduct found to be unlawful in the specific case." (*Supra.* at 1835). Also, in cases where the employer has committed violations of Section 8(a)(3) [in Delaware – 19 Del. C. § 13076(a)(3)], the standard remedy is a cease and desist order proscribing the misconduct. A review of the cases cited by DCOA affirms our belief that the [hearing officer] properly held that Mr. Harmon's conduct did not warrant a more severe penalty.<sup>13</sup>

Thus, the Board adopted the findings and recommendations as to remedy of the hearing officer. The State was ordered to:

---

<sup>13</sup> App. I at A-8 to A-10.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 11

1. Cease and desist from engaging in conduct that tends to interfere with, restrain or coerce any employee and or because of the exercise of any right guaranteed under [the Act].
2. Refrain from taking any retaliatory actions against members of DCOA.<sup>14</sup>

The Charging Parties appealed the Board's decision to the Court in accordance with 19 *Del. C.* § 1309. The Charging Parties tendered the following contentions:

1. The remedy imposed by the Board was inappropriate under the circumstances and inadequate because it would not prevent future unfair labor practices.
2. The Board failed to give due consideration to other appropriate remedies.
3. A board member who was absent at a previous meeting where the Board deliberated should not have participated in the final decision-making process.

---

<sup>14</sup> App. I at A-11. This is the Board's decision to which this appeal is directed.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 12

4. The Board violated the Freedom of Information Act by setting forth reasons (reference to a “standard remedy” and citation to a labor law treatise) in its written opinion that were not set forth in its public deliberations.

5. The Board’s decision that Cirwithian did not commit any unfair labor practice was contrary to the facts and not supported by substantial evidence.

Following oral argument, the Court remanded this matter to the Board to provide the Board member absent from the first Board hearing in this matter an opportunity to review the transcript of the discussions between the other Board members in order that his deliberations would be as fully informed as those of his colleagues.<sup>15</sup> The order that directed the remand provided in part:

[The Board member absent from the prior proceeding] shall be afforded the opportunity to read and consider the transcript of the January 25, 2001 hearing and the Board shall engage in such further deliberations as may be necessary or appropriate.

The Board met in accordance with the remand order. Review of the transcript of the first hearing did not alter the views of the Board member who had been absent from that meeting and, thus, the Board confirmed the two-to-one vote

---

<sup>15</sup> See *Del. Alcoholic Beverage Control Comm’n v. Alfred I. duPont Sch. Dist.*, 385 A.2d 1123, 1127 (Del. 1978).

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 13

in favor of adopting the findings and recommendations of the hearing officer. The Board, in its deliberations on remand, again considered the appropriate remedy. The majority expressed concern as to whether the remedy that it had selected was forceful enough, but, ultimately, it concluded that more “punitive” measures were not supported by the record before it. Because the majority concluded that Harmon’s bias did not adversely affect the promotion process, it was unwilling to remove the individuals who had been promoted – and whose qualifications for the open positions were not in question – from their new positions. As to future conduct by Harmon, the majority concluded, although perhaps without overwhelming conviction, that a cease and desist order would be adequate to preclude any such actions.

The matter is now before the Court after the Board submitted its decision on remand.<sup>16</sup>

---

<sup>16</sup> The parties, despite the Court’s invitation, did not seek to submit additional argument regarding the events before the Board on remand. Through the remand, the Charging Parties’ complaint about the participation of the one Board member who had not been present at the first hearing has been resolved. The other issues identified by the Charging Parties remain for the Court’s consideration.

## ANALYSIS

### 1. *Standard of Review*

The purpose of judicial review of a case decision by an administrative body such as the Board is to determine whether there are any errors of law and whether or not substantial evidence exists on the record to support the Board's findings of fact.<sup>17</sup> In appeals from the Board, this Court reviews questions of law *de novo*.<sup>18</sup> However, when reviewing the factual determinations of an administrative body, the standard of review is whether substantial evidence exists on the record to support the Board's findings of fact.<sup>19</sup> All factual findings by the Board that are supported by substantial evidence must be accepted as correct.<sup>20</sup> "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as

---

<sup>17</sup> *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 381-82 (Del. 1999).

<sup>18</sup> *Colonial Educ. Ass'n v. Bd. of Educ. of Colonial Sch. Dist.*, 685 A.2d 361, 363-64 (Del. 1996). Delaware's Administrative Procedures Act, 29 *Del. C.* Ch. 101 (the "APA"), does not govern appeals from the Board to this Court because this Court is not within the APA's definition of "court," 29 *Del. C.* § 10102(4), and the Board is not listed in 29 *Del. C.* § 10161, which identifies those state agencies to which the APA is fully applicable. Nevertheless, well-established principles of administrative law guide and control this Court's review of the Board's decisions.

<sup>19</sup> *Pub. Water Supply Co.*, 735 A.2d at 381.

<sup>20</sup> *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994); *Del. State Univ. v. Del. State Univ. Chapter of the Am. Ass'n of Univ. Professors*, 2000 WL 33521111, at \*3 (Del. Ch. May 16, 2000).

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 15

adequate to support a conclusion.”<sup>21</sup> “[C]redibility of witnesses, the weight of their testimony, and the reasonable inferences flowing therefrom are exclusively for administrative consideration.”<sup>22</sup>

An administrative agency’s choice of remedy, if based on substantial evidence and within its grant of statutory authority, is subject to the agency’s discretion and is evaluated by this Court under an abuse of discretion standard of review.<sup>23</sup>

---

<sup>21</sup> *Scheers v. Indep. Newspapers*, 832 A.2d 1244, 1246-47 (Del. 2003); *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

<sup>22</sup> *Coleman v. Dept. of Labor*, 288 A.2d 285, 287 (Del. Super. 1972).

<sup>23</sup> *Warmouth v. Del. St. Bd. of Exam’rs in Optometry*, 514 A.2d 1119, 1123 (Del. Super. 1978), *aff’d*, 511 A.2d 1 (Del. 1986) (TABLE); *see also Butz v. Glover Livestock Comm’n Co.*, 411 U.S. 182, 188 (1973) (not “so without justification in fact as to constitute an abuse of the Secretary’s discretion”) (internal citations and punctuation omitted). I reject the Charging Parties’ argument that because the facts in this case are undisputed (since the State did not appeal any of the Board’s findings) and the Board is mandated by statute to impose an appropriate remedy, review of the remedy involves the Board’s application of law to the undisputed facts and therefore *de novo* review attaches. *See* Charging Parties’ Opening Br. at 21-25. Not only is this argument against precedent, but it is also unsound. To give plenary review to an administrative agency’s remedy in all situations would be to ignore the experience and expertise of the Board in Delaware labor law. As this Court has recognized, this is “an area that requires or at least is greatly aided by such expertise.” *See Del. State Univ.*, 2000 WL 33521111, at \*3 (internal quotations omitted). As stated in *Butz*: “The applicable standard of judicial review . . . [requires] review of the Secretary’s order according to the fundamental principle that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy the relation of remedy to policy is peculiarly a matter for administrative competence. Thus, the Secretary’s choice of sanction was not to be overturned unless the Court of Appeals might find it unwarranted in law or without justification in fact.” *Butz*, 411 U.S. at

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 16

2. *Substantial Evidence Supports the Board's Finding That Cirwithian Did Not Commit Any Unfair Labor Practices*

The Charging Parties contend that the Board's finding that Cirwithian did not commit any unfair labor practices is not supported by substantial evidence. Their arguments focus on a connection between Cirwithian and Harmon and the fact that Cirwithian wrote and asked questions about applicants' union experience during the promotion process. The record, however, demonstrates that the Board's finding was supported by substantial evidence.

The Charging Parties' arguments that Cirwithian must have committed an unfair labor practice are as follows: (1) his credibility is at issue because he was evasive in answering questions regarding allowing applicants to see their test scores; (2) because of his actions in scheduling a meeting to review the test scores and then canceling the meeting, the test scores were never reviewed prior to the unfair labor practice hearing; (3) Cirwithian drafted the union questions asked during the interviews; (4) Cirwithian worked closely with Harmon; and (5)

---

185-86 (internal citations and punctuation omitted). The selection of a remedy is not a matter of statutory construction but, instead, is the exercise of statutorily granted discretion. *See* note 36, *infra* and accompanying text.



Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 17

Cirwithian did not discourage the anti-union bias of Harmon. These facts, if accepted, do not add up to show that the Board lacked substantial evidence to support its finding that Cirwithian engaged in no unfair labor practice.

First, Cirwithian's credibility as a witness is best decided in the administrative forum. The hearing officer had two days of testimony from eleven witnesses, including testimony from the Charging Parties and three other Department employees.

Second, the only evidence in the record that the Charging Parties were never able to review their scores is the conflicting testimony of Lighthall and Cirwithian. Both agreed that Lighthall asked to review his scores and that they were never actually reviewed. Lighthall testified that he never reviewed the scores because every time he went for a meeting, Cirwithian canceled it. Cirwithian, on the other hand, claims that he never canceled a meeting and that it was Lighthall who never showed up for the scheduled meetings. Thus, determining who was at fault for the missed meetings becomes an issue of credibility. Even if Cirwithian were at fault, it is far from clear that failure to allow Lighthall to look at his interview scores, by itself, would constitute an unfair labor practice.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 18

That Cirwithian drafted the union questions also does not provide substantial evidence to disturb the Board's ruling. The criticized questions were as follows:

1. Describe your experience in policy writing;
2. Describe your experience in disciplinary and DCOA or Local 247.<sup>24</sup>

The Board accepted Cirwithian's testimony that these questions were designed to elicit information about the applicant's knowledge of policy writing and familiarity with the contractual disciplinary procedures. The hearing office found neither question prejudicial because a Cook Manager, the position being applied for, is "expected to develop or contribute to the development of policy" and "supervise employees in the bargaining unit represented by DCOA."<sup>25</sup> The Board's finding with regard to Cirwithian's motives for asking these questions are supported by substantial evidence and constitutes a reasonable inference from the record.

Finally, Charging Parties allege that Cirwithian and Harmon worked closely together. There is nothing in the record, however, to support any contention that Cirwithian adopted Harmon's anti-union statements as his own or that he made any

---

<sup>24</sup> App. I at A-26 to A-27.

<sup>25</sup> *Id.* at A-27

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 19

such statements directly. Even if Cirwithian and Harmon worked closely together, the Board could reasonably conclude that the relationship did not taint Cirwithian's fairness and objectivity.<sup>26</sup>

In summary, I find that the Board's factual finding that Cirwithian did not engage in anti-union activity is supported by substantial evidence and, therefore, must be sustained.

3. *The Remedy Prescribed by the Board Was Within Its Discretion*

After determining that an unfair labor practice has been (or is being) committed, the Board must issue "an order requiring [the offending] party to cease and desist from such unfair practice, and to take such reasonable affirmative action as will effectuate the policies of the Act, such as payment of damages and/or reinstatement of an employee."<sup>27</sup> The Board issued a cease and desist order, and no one disputes that such an order was appropriate. The parties, however, diverge on whether "affirmative actions" to effect the statutory goals were necessary.

---

<sup>26</sup> The hearing officer carefully laid out his factual assessment of the charges against Cirwithian. App I at A-13, A-19 to A-20.

<sup>27</sup> 19 Del. C. § 1308(b)(1) "The Board is empowered and directed to prevent any unfair labor practice described in § 1307(a) and (b) of [Title 19] and to issue appropriate remedial orders." 19 Del. C. § 1308(a).

The Charging Parties proposed several additional remedies:

1. Promotion of Lighthall and Fritsch to CO Cook/Manager.
2. Demotion of Cirwithian from a supervisory position to a non-supervisory position.
3. Demotion of Harmon from a supervisory position to a non-supervisory position.
4. Awarding back pay and seniority to Lighthall and Fritsch.
5. Awarding the Charging Parties their attorneys' fees.<sup>28</sup>

The Charging Parties' suggested remedies fall into three general categories: sanctions for Cirwithian's conduct; sanctions for Harmon's conduct; and relief related to the promotional process, specifically, the award of promotion, back pay and seniority to Fritsch and Lighthall.

Because the Board's finding that Cirwithian committed no unfair labor practices is supported by substantial evidence, no remedy based upon Cirwithian's conduct would be appropriate.

---

<sup>28</sup> The Charging Parties sought imposition of the first four sanctions in their unfair labor practice charge. App. I at A-37. The application for attorneys' fees came later.

Similarly, the Board's finding that Harmon's anti-union animus, as clearly evidenced by his comments, did not adversely affect the promotional process is supported by substantial evidence<sup>29</sup> and, thus, the Board's failure to prescribe the

---

<sup>29</sup> The promotion committee consisted of four members. The Charging Parties do not question that two of the members were free of anti-union bias. The Board's finding that Cirwithian, the third member, did not engage in prohibited conduct deprives the Charging Parties of any claim as to his bias. Thus, only one of the four – Harmon – could have adversely and improperly manipulated the promotional process. The Board found that Harmon's rankings of Lighthall and Fritsch were consistent with or, indeed, more favorable than their rankings by other members of the promotion committee. In addition, the Charging Parties did not convince the Board that Harmon dominated or controlled other members of the committee. In short, the evidence before the Board was such that "a reasonable mind might find [it] adequate to support [the] conclusion" that Harmon's bias did not deprive Fritsch and Lighthall of a fair promotional opportunity. This analysis is thus consistent with the dual motive analysis of *Wright Line* as the anti-union comments were not a substantial factor in the promotion decision and neither Fritsch nor Lighthall would have been promoted had there been no anti-union activity. See *NLRB v. Wright Line*, 662 F.2d at 901-02 (plaintiff must "first 'make a prima facie showing sufficient to support the inference that (the employer's opposition to) protected conduct was a 'motivating factor' in the employer's (discharge) decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.'") (quoting *Wright Line*, 251 N.L.R.B. at 1090).

It certainly is understandable that Fritsch and Lighthall, in particular, may hold the view that any promotional process in which an individual with Harmon's intense anti-union bias played a major (*i.e.*, one of four committee members) role could not have been fair and that their statutorily protected union activities may have cost them promotions. Given the depth of Harmon's anti-union views and the relationships among the promotion committee members, it might well have been a reasonable conclusion that the process, despite having been fair in some superficial sense, was tainted. That conclusion, at most, would reflect another reasonable inference. That a contrary conclusion could have been drawn from the evidence does not, by itself, lead to a determination that the Board's findings were not supported by substantial evidence.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 22

remedies of promotion, back pay and seniority for Lighthall and Fritsch does not constitute an abuse of discretion.<sup>30</sup>

Next is the scope of the proper remedy for Hamon's actions. The Board was troubled, as it should have been, by his conduct and the members struggled with the perception and the reality that a cease and desist order would be nothing more than "a slap on the wrist." Yet the Board concluded that no additional remedy was necessary. Because it was focused on Harmon's conduct, which it had concluded did not taint the promotional process, the Board decided that a cease and desist order would be sufficient. While its reasoning was not set forth in great detail,<sup>31</sup> a majority did not believe that the record supported an enhanced sanction. In substance, it concluded, over vigorous dissent, that a cease and desist order would

---

<sup>30</sup> The Board was obviously troubled that promoting Lighthall or Fritsch would likely necessitate the collateral demotion of two other qualified individuals who had not engaged in any wrongdoing. While these decisions are made through the Board's exercise of its expertise and sophistication in employment matters, it is difficult to see how a cease and desist order alone would have met the statutory objectives if Harmon's anti-union bias had, in fact, compromised the promotional process.

<sup>31</sup> In its written opinion, the Board did mention that, in cases of this nature, the cease and desist remedy is standard. The colloquy among the Board members, however, demonstrates that the Board majority evaluated whether an affirmative remedy beyond the cease and desist order was appropriate. To the extent that the Charging Parties contend that the Board imposed a cease and desist order in an automatic or reflexive fashion, without considering the need for additional or broader remedies, that contention is not supported by the record.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 23

prevent any future manifestations of bias and, if it was wrong in that prediction of future conduct, would provide a sound basis for enhanced sanctions in the event of future objectionable conduct by Harmon.<sup>32</sup>

The question ultimately becomes whether, when measured under an abuse of discretion standard, the cease and desist order was reasonably calculated to prevent future anti-union conduct by Harmon. The Board did not believe that a more severe remedy – such as Harmon’s removal from a supervisory position – was warranted or necessary to effectuate the policies of the Act and, on the record before the Court, that was not an abuse of discretion.

Federal precedent is also helpful in assessing the appropriateness of the Board’s decision to limit the remedy to a cease and desist order.<sup>33</sup> The National Labor Relations Act (the “NLRA”)<sup>34</sup> and the Act contain the same operative

---

<sup>32</sup> The Board’s contemplation of subsequent enforcement if the cease and desist order proved inadequate does not demonstrate that the imposed remedy would not achieve the purposes of the Act. The Board did conclude that the selected remedy would suffice. The possibility of a subsequent enforcement action was not a justification for its conclusion; instead, it was a realistic assessment of the problem that it confronted and was consistent with its evident understanding that the remedy could not guarantee, in an absolute sense, future compliance.

<sup>33</sup> See, e.g., *City of Wilmington v. Wilmington Firefighters Local 1590*, 385 A.2d 720, 723 (Del. 1978).

<sup>34</sup> 29 U.S.C. § 160.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 24

language – imposition of “an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies” of the statute.<sup>35</sup>

The additional “affirmative action” remedy is for the Board in its discretion to choose to implement. Significantly, the Board is not mandated to impose any additional remedy.

Section 10(c) [29 U.S.C. § 160(c)] requires the Board [the NLRB] to order violators to “cease and desist” from their unlawful conduct, but it leaves in the Board’s charge the selection of any “affirmative action” that will “effectuate the policies of” the statute . . . . The Board’s discretion to interpret [a statute] is limited by the fact that the words and history of the statute set boundaries, which courts patrol. Section 10(c) gives the Board quite a different kind of “discretion.” The power to select “affirmative action” is not a power to interpret but a power to execute. The meaning of the statute is that the Board chooses; it is this choice, the fact of discretionary action, for which Congress has provided. This sort of discretion is scarcely reviewable at all, because the agency’s decision *is* the implementation for which the law calls.<sup>36</sup>

---

<sup>35</sup> Compare 29 U.S.C. § 160(c) with 19 Del. C. § 1308(b).

<sup>36</sup> *Communication Workers of Am., Local 508 v. NLRB*, 784 F.2d 847, 852 (7th Cir. 1986) (citations omitted). See also *Am. Fed’n of Gov’t Employees, AFL-CIO v. Fed. Labor Relations Auth.*, 716 F.2d 47 (D.C. Cir. 1983). In this case similar to the pending action, the labor agency adopted the remedy of a cease and desist order with posting. A manager had made numerous anti-union comments to a union representative who applied for, but did not receive, a promotion. The Federal Labor Relations Authority (“Authority”) found that, although the anti-union statements interfered with the exercise of an employee’s right to participate in a labor organization, those statements had not prevented him from obtaining the promotion. Instead, it



Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 25

Accordingly, the Board's decision to limit the remedy directed to Harmon's conduct to a cease and desist order is supported by substantial evidence and is not unwarranted in the law. In light of the deference which the Court must give to the Board's exercise of its discretion in selecting a remedy designed to implement the goals of the Act, the chosen remedy, on this record, must be sustained.<sup>37</sup>

---

found that the same decision would have resulted even in the absence of the protected activity and "that to promote the employee or rerun the selection process when it is demonstrated that the employee would not have been promoted in an unprejudiced proceeding puts the employee in a better position than he would have been in if he had not engaged in the protected conduct." *Id.* at 246. The Court, in noting the appropriateness of the cease and desist order, observed that "the Authority often orders an agency to cease and desist from unlawful conduct and to post a notice even when back pay, reinstatement, or rerunning of the selection process is not appropriate." *Id.* at 247. The Court further noted that "justice has been done" through the order because "[t]he order and notice will adequately reassure employees that their rights will be protected" because it commanded the agency not to interfere with employee rights, and informed employees that the agency will obey the law. *Id.*

<sup>37</sup> The Charging Parties are not entitled to an award of attorneys' fees. Under the American Rule governing fee awards, *see generally Johnson v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 545-46 (Del. 1998), a party must pay its own legal fees unless there is statutory basis for fee shifting or the opposing party has engaged in bad faith, vexatious, or oppressive conduct. *See Brice v. State, Dept. of Correction*, 704 A.2d 1176 1178-79 (Del. 1998). Here, the General Assembly has not shifted the burden of litigation expenses. In addition, the State's conduct – particularly in light of the Board's conclusions as otherwise sustained by the Court – does not justify an award of fees.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 26

4. *The Board Did Not Violate the Freedom of Information Act with Its Written Decision*

The Charging Parties contend that the Board violated Delaware's Freedom of Information Act ("FOIA")<sup>38</sup> by relying, in its written decision, on a treatise that denominates a cease and desist order as the "standard" remedy in cases of this nature.<sup>39</sup> No reference was made by the Board to the treatise or to any type of "standard" remedy during its public deliberations. The Charging Parties, in substance, assert that the reference to the treatise could only have been incorporated into the written decision through additional deliberations beyond the public meeting.<sup>40</sup> The Board, as required by FOIA, deliberated in public and

---

<sup>38</sup> 29 Del. C. Ch. 100.

<sup>39</sup> It may be that this argument is now moot in light of the Board's actions on remand. I choose not to address this issue because the parties have not focused on it and, more importantly, it is not clear whether the Board on remand reaffirmed its written decision or simply its initial vote in this matter.

<sup>40</sup> Despite the State's efforts to frame the issue otherwise, the question is not whether the Board could consider the treatise. First, the treatise was identified in the State's brief before the Board. Second, the Board is not prohibited from drawing on labor law treatises for guidance. The Charging Parties do not dispute that the Board could have considered the treatise and could have made reference to a "standard" remedy, even though they may have disagreed with the Board's actions, without violating the FOIA, as long as such references were made during the public meeting.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 27

arrived at a decision. That oral decision was followed by a written decision.<sup>41</sup> A subsequent written decision would, of course, serve no useful purpose if it merely parroted the words spoken by Board members at the public meeting. Furthermore, requiring the Board to convene a public meeting in order to allow Board members the individual opportunity to review the text of the written opinion prior to issuance would be likely to trigger a host of temporal problems. On the other hand, it would defeat the purposes of public deliberation if the Board could materially alter its analysis and adopt a new theory to support the result previously announced.

I am satisfied that the Board's decision should not be set aside as a violation of FOIA.<sup>42</sup> First, the Board's decision as adopted in the public meeting and amplified in the written decision can stand if those portions about which the

---

<sup>41</sup> The Act requires a written decision if the Board finds no unfair labor practice. The Act does not require written decision if the Board finds an unfair labor practice. *Compare* 19 Del. C. §1308(b) *with* 19 Del. C. § 1308(a). The Board's regulations, however, apparently contemplate a written decision regardless of the outcome. *See generally* Rule 7, Delaware Public Employment Relations Board Rules and Regulations.

<sup>42</sup> I do not reach several interesting questions which would ordinarily be predicates to this analysis. Those questions include whether a FOIA claim may be raised in the context of an administrative appeal (or whether it may only be raised in a separate action), *see* 29 Del. C. § 10005(a), or whether the Charging Parties have demonstrated that a "meeting" within the meaning of 29 Del. C. § 10002(e) occurred.

Douglas B. Catts, Esquire  
Ilona M. Kirshon, Esquire  
December 17, 2003  
Page 28

Charging Parties complain are excised. The Charging Parties are concerned about the reference to the cease and desist order as a "standard" remedy and a citing of the labor law treatise as support. Even without those specific references, the Board's decision is adequately supported. Second, the elaboration in the Board's written decision on its oral decision is nothing more than (1) a rephrasing of why it resolved the matter as it did and (2) a reference to a treatise that had been cited to it and, thus, was part of the record. In short, the written decision does not materially deviate from the oral decision and, accordingly, the Charging Parties have not demonstrated that the Board's order should be set aside through application of FOIA.

#### **CONCLUSION**

For the foregoing reasons, the decision of the Board is affirmed.

**IT IS SO ORDERED.**

Very truly yours,

*/s/ John W. Noble*

JWN/cap  
cc: Register in Chancery-K